

1 He's done that twice in a row but last night
2 was really a disaster. Anyway, that's -
3 that's the importance.

4 THE WITNESS: You know, normally
5 even if I didn't watch that game I would have
6 looked online or I would have found out in
7 moments before - when it was over who won that
8 game but this has got me pretty consumed and
9 I didn't do that. But you know, that's an
10 example of what I'm saying is timeliness is
11 important. So in short, on Tennis Channel,
12 Tennis Channel runs an enormous amount of
13 tournament programming. As I said earlier, ■
14 percent of their air time is filled with
15 tournaments. About ■ percent of that is
16 repeats. Event's over, they play it on Tennis
17 Channel or they play it on ESPN2, they play it
18 on CBS, whatever, and they're replaying it.
19 And what I found in short on Tennis Channel is
20 they run an enormous amount of tournament
21 programming and then they air it and then they
22 re-air it and re-air it in the weeks following

1 the event and for weeks thereafter, months
2 thereafter, and sometimes they'll even bring
3 it back in a longer time period. Now, Golf
4 Channel runs a lesser amount of event
5 programming, but what they run is much
6 fresher. So they'll run a tournament and then
7 they may often repeat that round that night so
8 they'll cover a round in the morning and then
9 they'll repeat that coverage at night. And
10 then if they run a Sunday round, the final
11 round, that's how golf goes usually, Thursday,
12 Friday, Saturday, Sunday, they may repeat that
13 round on Monday. For the most part it's then
14 gone, unlike tennis they're not going to be
15 replaying it thereafter. So it's a lesser
16 amount but it's much fresher and in fact what
17 I call the gold standard of timeliness in
18 television programming and that is live or
19 same-day - first-run same-day delay
20 programming.

21 JUDGE SIPPEL: What does that
22 mean?

1 THE WITNESS: Okay so again,
2 without making your hair hurt, it's either
3 live, they covered it live or -

4 JUDGE SIPPEL: I know what that
5 is.

6 THE WITNESS: - they're airing it
7 - it's the first time it's been aired, hasn't
8 been aired somewhere else, right, and it's the
9 same day that the event occurred. So it's
10 very timely. It's not a repeat, (a), and it's
11 timely, it's the same day. So they're airing
12 it at night. Where that comes in for instance
13 -

14 JUDGE SIPPEL: Has anybody run it
15 before you though on a time basis? In order
16 to qualify for that do you have to be the
17 first person to do -

18 THE WITNESS: You have to be the
19 first to run it, right. No one else has run
20 it. So it's first-run. That's the meaning of
21 first-run.

22 JUDGE SIPPEL: In delay or what is

1 it, what is the first one called?

2 THE WITNESS: It's first-run.

3 There are two -

4 JUDGE SIPPEL: Real time?

5 THE WITNESS: - two factors.

6 First-run, no one else has run it before, and
7 (b), it's the same day the event occurred.

8 JUDGE SIPPEL: Okay.

9 THE WITNESS: So you know, I'll
10 just give you an example to make it make
11 sense. So an event occurs in Australia.
12 Australia is 16 hours ahead of us, right? So
13 the event may be occurring at a time that is,
14 you know, late night here, right? And so
15 rather than - so a network may record it
16 saying, you know, we're not going to air it
17 right now, we've got something else that we'll
18 air at this time. We'll record it and then
19 we'll play it tomorrow morning, you know, in
20 our Eastern time tomorrow morning, right?
21 Okay? But tomorrow morning Eastern time is
22 the same day that it occurred in Australia,

1 right? So that's an example of -

2 JUDGE SIPPEL: Okay, I understand.

3 THE WITNESS: - first-run same
4 delay - same-day delay. Okay. Now in today's
5 internet world even that's been diminished a
6 bit in importance. You know, like you take my
7 kids, their smart phones, you know. I mean,
8 they know everything when it happens. So the
9 odds of them going to watch that thing,
10 probably not great. For an old fogie like me
11 I might sit and watch it the next day, right?
12 So same day but next day in Eastern time. So
13 that's live first-run same-day delay. And I
14 compared the amount of hours that each of
15 these two channels runs on that basis, right?

16 JUDGE SIPPEL: The two being what,
17 Golf?

18 THE WITNESS: And Tennis. Because
19 I finished telling you that in my opinion, my
20 analysis, looking at those 15 weeks, looking
21 at television, Tennis runs more event
22 programming than Golf does but it tends to be

1 more dated and more repeated, far more
2 repeated than what's on Golf. Golf gets it
3 on, repeats it maybe once, some of it, and
4 it's gone. Tennis is repeating it more often.
5 So I drilled down further to see well, let me
6 see about live same-day, what I'm calling gold
7 standard, and I found that Tennis is running
8 approximately - and the numbers are in the
9 report - approximately [REDACTED] hours in 2010 of
10 live or same-day programming and Golf Channel
11 is running approximately [REDACTED] hours of live
12 same-day programming. So even though Tennis
13 is running more event programming -

14 JUDGE SIPPEL: Right.

15 THE WITNESS: - they're running
16 far less live same-day. You know, again, it's
17 just a clear snapshot of the differences
18 between these two things. And again, I step
19 back and I'll just put the context in of why
20 I say these channels are so different. A
21 viewer turns it on. That's what matters,
22 what's on the screen. Boom. Oh, okay, that's

1 Wimbledon, that occurred yesterday, I saw that
2 on CBS. All right? Not compelling. Boom, I
3 turn it on, it's a live same-day golf match
4 from you know the Phoenix Open or - I'm making
5 that up. Very different, okay? Very
6 different experience. I think the customer is
7 - is more likely to stay with that live same-
8 day stuff than the repeat. So to me -

9 JUDGE SIPPEL: But isn't it more
10 complicated than that? You've got people that
11 -

12 THE WITNESS: Absolutely.

13 JUDGE SIPPEL: - people - any
14 person that's working in this environment, I
15 mean particularly in a city environment, you
16 might easily miss a Wimbledon match because
17 you're doing something else. And it would be
18 great if you're that much of an enthusiast of
19 tennis people to pick it up to watch that
20 match. And you know, maybe - even if you know
21 who won the match it was a tight match and you
22 want to see Nadal and somebody else, Federer,

1 battle it out because you're seeing it.

2 THE WITNESS: Yes.

3 JUDGE SIPPEL: So am I making
4 sense?

5 THE WITNESS: You're making
6 absolute sense. There are many factors that
7 come into the equation of whether viewers are
8 going to watch, right? This is - this
9 timeliness aspect is one and I'm just saying
10 it's one factor of the equation and in my
11 opinion and the way - well, in my opinion, it
12 is a motivator for more television viewing
13 live same-day. Now, there are other factors.
14 I may not care about the Phoenix Open, right?
15 So I'm not going to watch. And so you know,
16 there's many things that go into this right
17 but I'm just - to really get beyond this claim
18 that was made and really examine it of well,
19 they're all sports channels, they're all one
20 class so we don't really have to think about
21 that anymore. I really put myself in the
22 shoes of a television programming guy and a

1 content guy who is buying programing for a
2 distributor that's - that's what I've done and
3 taking for viewers and customers and really
4 trying to drill down, okay so yes, they're
5 sports channels, but what are they airing?
6 Right? And on the event side how timely is
7 this stuff? Is this live same-day, is it the
8 next day, is it original, is it repeat?
9 Because all these things drive viewership and
10 so on and so forth. I also looked at the non-
11 event stuff, trying to get a sense of how much
12 of that did they air. When I turn it on,
13 again, if I've got three screens and I turn it
14 on [REDACTED] percent of the time on Tennis Channel
15 it's an event, [REDACTED] percent of that it's a
16 repeat so I might turn it off because I said
17 I saw that already but it's an event. [REDACTED]
18 [REDACTED] percent of the time on Versus it's an
19 event. Almost [REDACTED] percent of the time it's not
20 an event. [REDACTED] roughly of the time I
21 turn on Golf Channel it's an event. [REDACTED]
22 [REDACTED] of the time it's not an event. Very

1 different experience, you know, very - so I
2 think - I think a surface sort of wave of the
3 hand that they're all sports channels is
4 really not a real analysis of what's the
5 differences among these channels or the
6 similarities among these channels.

7 JUDGE SIPPEL: Well, they're
8 admittedly sports channels, right? Tennis and
9 golf are both sports some would say.

10 THE WITNESS: I would also say
11 Versus is a sports channel. It's twenty
12 sports, but you know, it's a sports channel.

13 JUDGE SIPPEL: Well, okay. I
14 mean, I'm not the expert here but I'm just
15 trying to think that one through a little bit.
16 See, I wouldn't be - like I've got my son-in-
17 law's from Germany. I wouldn't say hey
18 Martin, you ought to see this sports channel
19 we've got here. I don't think I'd call it
20 that. I'd say you've got to see these, you
21 know, you've got to see these programs but -
22 well, I guess you could. Sure. Why not, why

1 not. Now, well I think you pretty much -
2 something I wanted to ask you about. Oh I
3 know. I'll give another illustration. When
4 I was up in North Creek last time it's not too
5 long ago I guess it was - the Masters was
6 played -

7 THE WITNESS: In April.

8 JUDGE SIPPEL: Yes. I was there
9 in April. And I had some - I'd had some down
10 time, my cousin's husband has a restaurant
11 there, told you about that, and so I was kind
12 of intermediate then. She was down at her
13 shop. So I was sitting there anyway watching,
14 there's this great big huge screen that he
15 has, I mean huge, huge screen and he's got the
16 - of course he's got the remote and he's got
17 these - something coming in from outer space
18 that you can get anything on there. I mean,
19 you can get absolutely anything on there. And
20 he had it set up for me, he was explaining to
21 me how for the Masters what you can do is
22 you've got about four or five different

1 selections that you can toggle to and one of
2 them is you can get the top - the top - I mean
3 you can get four - you have choices of four
4 different individual matches going on. Am I
5 saying this the right way? You've got people
6 playing different rounds, different, but you
7 know, they're coming right after each other.
8 And you might have one that's really close to
9 the end, so you can get that one and then you
10 can toggle to another one that's not quite
11 there but it has some big - some of the
12 leaders in it, and then you can toggle to
13 another one and another one.

14 THE WITNESS: Interesting.

15 JUDGE SIPPEL: You don't have to
16 watch from the first tee on, you just kind of
17 - something almost like the red zone.

18 THE WITNESS: Yes, right.

19 JUDGE SIPPEL: It's just going
20 bing, bing, bing, bing. And it really isn't
21 because really you want to see that - right?
22 If it's a close match -

1 THE WITNESS: Right.

2 JUDGE SIPPEL: - you want to see
3 those putts on the last two or three greens.

4 THE WITNESS: Absolutely, yes.
5 Must be - I'm not familiar with that. It must
6 be a CBS feature that either they're
7 delivering via satellite - I haven't seen it
8 on cable so that's the only reason I'm saying
9 satellite - or online, and that they have all
10 these different feeds and you can select among
11 them.

12 JUDGE SIPPEL: What do you mean
13 online? You mean -

14 THE WITNESS: Internet.

15 JUDGE SIPPEL: - off the internet?

16 THE WITNESS: Yes.

17 JUDGE SIPPEL: No, this is off the
18 programming but I can't speak to -

19 THE WITNESS: And do they have
20 satellite there?

21 JUDGE SIPPEL: Yes, that's all - I
22 mean, I don't think you can get - I don't know

1 if they get cable in there.

2 THE WITNESS: Yes. I don't know.
3 I don't know either.

4 JUDGE SIPPEL: I don't know. I
5 really - I don't really know, I don't care.
6 But he's got the - he's got the prima prima
7 and to watch it with him there on the couch,
8 forget it because he's got this thing that he
9 can - he's constantly moving his programming
10 all over the place. And it's mostly in
11 sports. All over the place. And I've got
12 another young son-in-law who's - he's in his
13 thirties and his big thing is the reality
14 show, what is it called fishing, dangerous
15 fishing or?

16 THE WITNESS: Oh.

17 JUDGE SIPPEL: Ultimate fishing.

18 THE WITNESS: Oh, I'm not sure
19 what you're referring to. There's one on I
20 guess it's Discovery or Learning Channel where
21 they're fishing in like the Bering Sea.

22 JUDGE SIPPEL: Yes, yes. That

1 kind of thing. Yes.

2 THE WITNESS: That's - I don't
3 know its ratings but I know they're huge.

4 JUDGE SIPPEL: Well he just - he
5 can't get enough of that.

6 THE WITNESS: Yes.

7 JUDGE SIPPEL: Or the Dirtiest
8 Job. You familiar with that? I don't know if
9 that's a sports or if that's - what else would
10 you call it?

11 THE WITNESS: Reality show. I
12 laugh about these but I actually got hooked on
13 two of them. River Monsters, ever see that
14 one?

15 JUDGE SIPPEL: I should write that
16 one down.

17 THE WITNESS: A crazy show where a
18 guy goes all over the world looking for giant
19 fish that live in the river and - of course
20 rather than stand on the shore in a safe spot
21 and catch them he has to go in. And so now
22 you're wondering whether he's going to be

1 eaten. And then the other show is this - I
2 don't remember the name of it. They chase
3 whaling, ever seen that show? Where there's
4 a whaling ship - well, there's Japanese
5 whaling ships and these folks who are trying
6 to save the whales chase the ships and try and
7 harass them, get between them and the whale to
8 get the whale away. And it -

9 JUDGE SIPPEL: So the sport is
10 among these ships, not the whale?

11 THE WITNESS: And it gets very,
12 very dramatic and in fact confrontational and
13 the Japanese ships actually - the last one I
14 watched they actually rammed and sunk the
15 other, you know, the save the whales people.
16 So I laugh at some of this but I end up
17 watching some of it.

18 JUDGE SIPPEL: Jack Kennedy had a
19 similar experience with a Japanese ship.

20 THE WITNESS: Yes, right, right.

21 JUDGE SIPPEL: It still happens,
22 huh? Okay, I'm finished. I promise you I'm

1 finished.

2 MR. TOSCANO: Mr. Egan, you've
3 been talking about your opinions regarding
4 dissimilarities in programming. But you also
5 expressed opinions regarding the
6 dissimilarities in audience and I'd like to
7 focus on some of those. First of all, do you
8 have an opinion about Mr. Brooks' conclusion
9 regarding the relative size of Tennis
10 Channel's audience as compared to the
11 audiences of Golf Channel and Versus?

12 THE WITNESS: I do. I have a
13 strong opinion. So Mr. Brooks postulates that
14 the audiences for Tennis are similar to those
15 for Golf and Versus in two ways, both in size
16 and in makeup, demographics, and he deals with
17 each of those separately. My conclusion in
18 both cases is that his evidence is not
19 convincing. So let me - if you'd like I'll
20 start with the size portion of that.

21 BY MR. TOSCANO:

22 Q Please.

1 A Okay. All right. So - I'll
2 wait on the judge for a moment.

3 JUDGE SIPPEL: I'm sorry. I'm
4 just asking about the temperature in here.
5 It's going to be hot until - they're working
6 on the - on a water leak right behind the wall
7 here.

8 THE WITNESS: I thought maybe you
9 just had a heater in the seat to you know, get
10 me on edge here, no?

11 JUDGE SIPPEL: So anybody want to
12 remove their jackets please. You also sir,
13 you can remove your jacket. I can't do
14 anything to control the temperature.

15 THE WITNESS: Good.

16 JUDGE SIPPEL: Completely out of
17 control. Keep going.

18 THE WITNESS: So if I could get
19 you to turn to - I'm going to use visual aids
20 here. So if we can go to page 44 of my
21 written testimony, to map 1 that appears in
22 paragraph 73. It's on page 44. Okay. So you

1 see there's a map of the United States with a
2 bunch of little dots in it. So what Mr.
3 Brooks proposes is that if he came demonstrate
4 that the viewership for the Tennis Channel
5 among Tennis Channel customers, subscribers is
6 somewhere within shooting distance of the
7 viewership of Versus and Golf Channel among
8 its customers in the markets that are marked
9 by the little dots on my map, right? His
10 theory is that if I can demonstrate to you
11 that the ratings that are being generated for
12 Tennis Channel and its universe are somewhat
13 similar to those that are being generated for
14 Golf and Versus in its universe in these
15 markets - each of these dots is a market -
16 then I (meaning Mr. Brooks) can project to the
17 rest of the country and I could say that if
18 Tennis Channel were carried on widely
19 distributed tiers throughout America just like
20 Versus and Golf are that it's ratings would
21 continue to be similar. That's his theory.
22 That's his argument, okay? And he goes

1 through a discussion of how to get there. And
2 I'll shorthand this for you. So a sample, to
3 be projectable a sample must be representative
4 in research terms. Representative means that
5 the population of a sample must be similar to
6 and be composed similarly to the larger
7 population. So in our case these dots which
8 add up to ■ markets must be representative of
9 the entire country. And the customers
10 receiving the channels in these dots right
11 must be similar to the customers receiving
12 expanded basic cable throughout the United
13 States, okay? That's what Mr. Brooks needs to
14 prove. Now, Golf and Versus would be very
15 simple if Tennis Channel had Nielsen -
16 national Nielsen ratings because we could
17 simply look at them. Tennis Channel doesn't
18 have national Nielsen ratings. Golf does,
19 Versus does, Tennis Channel doesn't. So what
20 Tennis Channel did is it acquired - and not
21 Mr. Brooks - Tennis Channel acquired
22 viewership data in these markets which account

1 for [REDACTED] markets in the United States. It
2 acquired Tennis Channel viewership, Versus
3 viewership, Golf Channel viewership, okay?
4 And then it aggregated the ratings in these [REDACTED]
5 markets and glommed them into one big rating
6 and aggregated what he calls coverage rating,
7 in other words the households receiving it,
8 okay? And I'm sorry if I'm boring you, I'll
9 try and make this simple. So I have to tell
10 you I've never seen that done before. I've
11 never seen anybody aggregate local ratings.
12 I've seen people use local ratings, I've never
13 seen them aggregate it together. I can't tell
14 you that's statistically reliable. I have my
15 doubts about that based on what I'm looking at
16 here. So I can't say that he's even got
17 reliable ratings for any of these, whether
18 it's Golf Channel, Versus or Tennis Channel,
19 but that's what he's done, okay?

20 Now, even assuming that he got to
21 some sort of statistically reliable rating
22 number the exercise is fatally flawed because

1 his sample is clearly not representative of
2 the population of the United States, the cable
3 and DBS population of the United States.
4 Nielsen says every house for - and they're
5 speaking to a statistically accurate
6 representative national sample. I'm quoting
7 from Nielsen from their website. "Every
8 household in the United States has the chance
9 of being selected no matter where it's
10 located." That is their requirement for their
11 national sample to be statistically reliable.
12 So I'll ask you when you look at this map does
13 every household in the United States have an
14 equal chance of being selected? The answer is
15 obviously they don't. And in fact, if you
16 then think about where they are and you look
17 at where they're located, they're located
18 generally in warmer weather markets, Pacific
19 Coast, southeastern United States. Makes a
20 lot of sense to me because if I were a cable
21 or DBS operator I would tend to carry it there
22 first, right? So makes sense to me. So we

1 really would need go no further. I only go
2 further because Mr. Brooks has provided this
3 argument, but really you could stop right
4 there and say this is not projectable, it is
5 not representative, we can't project from it.
6 However, I'll give you a couple of other
7 insights that I found in this. So when you
8 look at it and you say well, they're in warmer
9 weather markets, wouldn't tennis be of more
10 interest to people in warmer weather markets?
11 They can play it year-round or nearly so,
12 okay? So I don't really know the answer to
13 that, right, but it seems logical. So I
14 purchased a study from an independent
15 organization called the National Sporting
16 Goods Association that tracks tennis interest
17 through every state and then aggregates them
18 into regions using Census regions. And lo and
19 behold when I overlay their top five tennis
20 regions, participation in the United States on
21 top of Mr. Brooks' markets you see the map
22 that appears on the next page, map 2 on page

1 45. The shaded areas are the top five markets
2 and you can see that Mr. Brooks' markets are
3 very heavily skewed to the top five tennis
4 markets in the United States. Now, I can't
5 prove to you that people who play more tennis
6 watch more tennis, I don't know. Logically it
7 seems like it's probably true. There's been
8 some argument in some of the Tennis Channel
9 filings that it is relevant to looking at this
10 issue. I don't know. But I can certainly
11 tell you it's skewed that way. Moreover, I
12 want to point out to you that there's ■
13 markets that this sample represents. There
14 are ■ markets in the United States, not ■.
15 We're barely at ■ percent of the markets.
16 These are the largest markets in the United
17 States. We're leaving out Hooks and Bullets
18 country, right? We're leaving out rural
19 America here. We're leaving out hockey
20 markets. Minneapolis-St. Paul, Chicago,
21 Boston. This is where hockey is most fervent.
22 They're out. So you know, when we're

1 comparing ratings for NHL on Versus and we
2 don't have those markets in how valid is that?
3 So this thing has lots of problems.

4 Now, my last - and I guarantee you
5 I won't drone on any further about this, but
6 my last metric and I looked at this, and maybe
7 the most important of all but clearly
8 critically important is that Tennis Channel
9 and in these ratings that he's come up with is
10 only in ■ percent of the households in these
11 markets. So what does that tell you? That
12 tells you that it's tiered. And for - and we
13 know by looking at the distribution of Tennis
14 Channel that the majority of those tiers are
15 sports tiers or nearly so. Dominated
16 predominantly by sports services. And so the
17 people that he's measuring the viewership for
18 Tennis Channel are people who've already said
19 by paying extra money, right, by subscribing
20 to a service that's sports-oriented I'm a
21 sports enthusiast. I want sports. And now
22 we're asking about their viewership of Tennis

1 Channel. It's a rigged game. Conversely,
2 Versus and Golf Channel are in approximately
3 ■ percent of the homes in his market. These
4 are, you know, in quotes, "every man." These
5 are expanded basic cable and DBS subscribers
6 who get hundreds of channels as part of the
7 package, Versus and Golf happen to be two of
8 them. And so now he's taking the rating on
9 there and he's comparing them. And he's
10 saying look, you know, it's within shooting
11 distance. I would say that it actually to me
12 sort of intuitively proves the opposite, that
13 if the best Tennis Channel can do is in its
14 most favorable markets in the United States
15 among self-selected sports enthusiasts could
16 possibly produce a rating that's within
17 shooting distance of Golf Channel and Versus
18 as tabulated in every man's home, then it's
19 hard for me to believe that if they were
20 distributed widely throughout America that
21 they could produce any sort of equivalent
22 ratings. And so I come to the conclusion that